92-611

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

OLD BRIDGE CHEMICALS, INC.,

Petitioner,

vs.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether New Jersey's hazardous waste regulations, which apply federal hazardous waste codes to identify by-product materials deemed hazardous only in New Jersey, are inconsistent with the Resource Conservation and Recovery Act and undermine the uniform federal regulation of hazardous waste.

II. Whether the suspect regulations violate the Commerce Clause of the United States Constitution as a consequence of their inhibiting impact upon the movement of the by-product materials in interstate commerce.

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No.

In the

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OLD BRIDGE CHEMICALS, INC.,

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vs.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Old Bridge Chemicals, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. *infra*, pp. 5a to 26a) is reported at 965 F.2d 1287 (1992). The opinion of the District Court of the District of New Jersey (App. *infra*, pp. 27a-40a) is reported at 18 Evnt'l. L. Rep. 21 (1988).

STATEMENT OF JURISDICTION

Invoking jurisdiction under 28 U.S.C. § 1331, petitioner first brought this suit in the United States District Court for the District of New Jersey. On September 4, 1991, the District Court granted the New Jersey Department of Environmental Protection's ("NJDEP")[1] Motion for Summary Judgment holding that, as a matter of law, the challenged environmental regulations do not violate the Commerce Clause or the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*

On appeal pursuant to 28 U.S.C. § 1291, the United States Court of Appeals for the Third Circuit entered a judgment and order on June 10, 1992 affirming the decision of the District Court. On July 8, 1992, the Third Circuit denied Appellant's Petition for Rehearing.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner challenges certain New Jersey hazardous waste regulations in which federally designated hazardous waste codes are applied to recycled by-products, defined as "solid waste" by the regulations. The pertinent parts of N.J.A.C. 7:26-1.6 *et seq.* are reprinted at pages 00a-00a of the Appendix to this Petition.

Petitioner asserts that N.J.A.C. 7:26-1.6 *et seq.*, violates the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* and the Commerce Clause of the United States Constitution (U.S. Const., Art. I, § 8).

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1. Now the New Jersey Department of Environmental Protection and Energy.

STATEMENT OF THE CASE

Petitioner, Old Bridge Chemicals, Inc. ("OBC") is a chemical manufacturing company which, for the past 20 years, has purchased chemicals from out-of-state suppliers which are by-products of the manufacturing of primary marketable commodities. OBC, in turn, uses these by-products for the production of pure chemicals for sale to industry in the agricultural, water treatment, dry cell battery and textile manufacturing fields.

In 1987 NJDEP adopted and published a revised definition of "solid waste." N.J.A.C. Code 7:26-1.6. This revision made New Jersey's definition more expansive than the federal definition of solid waste. 40 C.F.R. § 261.2 (1990). More particularly, while the federal definition excludes any materials recycled "as effective substitutes for commercial products," 40 C.F.R. § 261.2 (e)(1)(ii), New Jersey now considers any recycled "by-product" material a solid waste. Thus, the chemicals used by OBC as raw materials fall squarely within the exclusion in the federal definition of solid waste, but are included within the New Jersey definition.

In addition, New Jersey deems a solid waste to be hazardous if "it exhibits characteristics of hazardous waste identified in N.J.A.C. 7:26-8.9 through 8.12" (App. *infra*, pp. 00a to 00a). The by-product chemicals used by OBC exhibit such characteristics and therefore are hazardous under these regulations. However, they are not hazardous under the federal regulations because of the exclusion in the federal definition of solid waste. Unfortunately, under New Jersey's regulatory scheme, solid wastes which are characteristically hazardous within that state only must be identified for record-keeping purposes by the appropriate United States Environmental Protection Agency ("EPA") hazardous waste number from D001 through D017. Because the by-product

chemicals purchased by OBC are classified using nationally recognized RCRA hazardous waste codes used by the EPA, the materials appear to be hazardous under RCRA when, in fact, they are only deemed hazardous by New Jersey.

On January 11, 1990 the NJDEP formally advised OBC that it viewed the by-product chemicals zinc oxide, copper sulfate crystals and solution and sulfuric acid, which OBC imported from out-of-state suppliers, as "hazardous wastes" subject to NJDEP's hazardous waste regulations. As a result of this determination, New Jersey required that these "wastes" be manifested to an interim status or RCRA permitted Treatment Storage and Disposal Facility ("TSDF") or to a permitted Waste Reuse Facility as defined at N.J.A.C. 7:26-1.4.

The applicable New Jersey hazardous waste regulations result in the following[2]:

(1) Materials emanating from New Jersey, if determined to be "by-products" solid wastes, which are also hazardous by characteristics, must be manifested as apparent RCRA hazardous wastes. Out-of-state companies to whom they may be consigned may not be permitted treatment, storage and disposal facilities ("TSDF's"). Copies of the New Jersey hazardous waste manifests documenting such shipments are required to be forwarded to the receiving state's environmental agency, thereby suggesting that an unauthorized facility in that state is receiving RCRA hazardous waste. In actuality, the "by-product" materials may have been purchased for use as raw materials not subject to RCRA. But for New Jersey's regulations, they could have been shipped (illegally only in New Jersey) under a straight bill of lading.

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2. The factual assertions raised by OBC below must be accepted as true since they were before the courts below on a motion for summary judgment. *Celotex Corporation v. Catrett*, 477 U.S. 317 (1985).

(2) New Jersey state designated hazardous wastes are required to be manifested as apparent RCRA hazardous wastes from out-of-state companies to New Jersey companies which are not TSDF's, but are "Waste Reuse Facilities" under New Jersey regulations. Because New Jersey requires that Waste Reuse Facilities obtain EPA Identification numbers, there is no practical distinction between the description of a "Waste Reuse Facility" and a TSDF on the manifest. As a result, the generator state or the EPA Regional Office will require the "generator" of such federally non-hazardous by-products to comply with the requirements of RCRA in the management of the materials pursuant to 40 C.F.R. § 62.

In response to the enactment and implementation of the newly amended N.J.A.C. 7:26-1.6, OBC's out-of-state suppliers have either refused to continue to sell such materials to OBC or have threatened to withdraw as suppliers. The out-of-state companies do not wish to expose themselves to potential environmental enforcement actions which might arise as a consequence of New Jersey's aberrant use of standard RCRA hazardous waste codes.

On June 22, 1990, OBC sued NJDEP in federal district court seeking declaratory and injunctive relief and asserting that NJDEP's challenged hazardous waste regulations violate the Commerce Clause of the Constitution of the United States. On January 7, 1991, OBC filed an Amended Complaint asserting a new cause of action, pursuant to the citizens' suit provision of RCRA, 42 U.S.C. 6972, stating that the regulations in question were also violative of RCRA. 42 U.S.C. 6901*et seq.* On January 14, 1991, NJDEP filed its Answer to the Amended Complaint. On February 1, 1991, prior to any discovery taking place, NJDEP moved for summary judgment upon all of OBC's claims. NJDEP alleged that, as a matter of law, its hazardous waste regulations are not violative of the Commerce Clause or RCRA.

In an opinion and order issued on September 4, 1991, the

Honorable Maryanne Trump Barry of the United States District Court for the District of New Jersey granted NJDEP's motion for summary judgment and held, as a matter of law, that the suspect regulations were not violative of the Commerce Clause or RCRA.

On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court decision. This Petition seeks review of the United States Court of Appeals for the Third Circuit's unprecedented decision.

REASONS FOR GRANTING THE WRIT

I.

THE NEW JERSEY REGULATIONS UPHELD BY THE THIRD CIRCUIT DISRUPT AND THREATEN THE UNIFORM REGULATORY SCHEME ESTABLISHED BY RCRA.

While this Court has held that there exists "no clear and manifest purpose of Congress to preempt the entire field of interstate waste management", *City of Philadelphia v. New Jersey*, 437 U.S. 617 at 621 (1978), there is no precedent for allowing state administrative regulations to undermine the operational integrity of a comprehensive federal program.

> While the collection and disposal of solid wastes should continue to be primarily the function of state, regional, and local agencies, the *problems set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership* . . . (emphasis added).

42 U.S.C. 6901(a)(4) (1982).

Petitioner asserts that the challenged New Jersey regulations defeat the primary purpose of RCRA, which is to implement a uniform national system of minimum standards for managing hazardous wastes, and that state regulations, even if purportedly more stringent, must not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The Third Circuit's finding that ". . . the EPA codes accompanied by a manifest listing the waste as New Jersey-only hazardous waste has the same effect as using state-specific codes" (App. 23a-24a, *infra*) is unfounded. No evidence was presented in the district court to support such a conclusion. Rather, OBC provided evidence by affidavit that using RCRA hazardous waste codes on a uniform manifest to identify hazardous wastes unique to New Jersey creates a misperception that the materials identified are indeed federally regulated hazardous wastes.[3] NJDEP can entirely cure this problem through the simple and expedient mechanism of substituting state specific hazardous waste codes.

Moreover, while OBC concedes that RCRA allows states to adopt more "stringent requirements", there are limits to a state's authority to do so. It is clear from the express language of RCRA that a state's authority to regulate more "stringently" should extend to issues of particularly local concern, such as implementing more stringent regulations concerning "site selection" for the disposal of RCRA wastes within a state's geographical boundaries. *See, e.g.*, 42 U.S.C. § 6929. In contrast, New Jersey's indiscriminate borrowing of RCRA waste codes to effectuate state purposes causes confusion on a national level and effectuates *de facto*

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3. The Third Circuit opined that the "comments" section on the manifest form could be used to identify the materials as New Jersey special wastes, however, there was no evidence presented by NJDEP as to the use, if any, of the "comments" section, or if use of this section is discouraged or encouraged.

regulations outside of its borders. Tribe, *American Constitutional Law*, 435 (2d ed. 1988).

Contrary to the lower courts' opinions, RCRA does not sanction indiscriminate state regulation in the field of hazardous waste management merely because it is more stringent. By permitting a state to implement RCRA incompatible hazardous waste regulations on grounds that they are more stringent, the courts below would sanction the rendering of the uniform federal minimum standard operationally ineffective and, therefore, less stringent.

It is well established by this Court that state activity which conflicts with or undermines a federal act cannot stand. *Florida Line of Avocado Growers. Inc. v. Paul*, 373 U.S. 132 (1963); *Savage v. Jones*, 225 U.S. 501 (1918).

The New Jersey regulations clearly conflict with federal law. Their continued use will serve to discourage businesses from transporting materials necessary for manufacturing processes into and through New Jersey. Indeed, OBC and similarly situated businesses, which depend upon chemicals manufactured out-of-state for their own manufacturing operations, will be irreparably harmed by these regulations. Accordingly, they must be invalidated.

II.

THE THIRD CIRCUIT'S DECISION UPHOLDING NEW JERSEY'S REGULATIONS CONFLICTS WITH THIS COURT'S PRECEDENTS AND THE DECISIONS OF ANOTHER CIRCUIT ON A QUESTION OF GREAT IMPORTANCE.

The decisions below upholding New Jersey's regulations against Petitioner's claims that they violate the Commerce Clause

and RCRA rest upon a misapplication of this Court's decisions which hold that legislation will be invalidated if it discriminates against interstate commerce in its practical effect, whether or not it evinces a discriminatory intent. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). This Court has stated on numerous occasions that legislation must be assessed using a strict scrutiny standard if it discriminates against interstate commerce in its *practical* effect.[4] *See, e.g., Amerada Hess Corp. v. Director Division of Taxation*, 490 U.S. 66, 75-76 (1989); *American Trucking Assn's. Inc. v. Scheiner*, 483 U.S. 266, 286 (1987); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-353 (1977).

This standard has repeatedly been applied in cases in which discrimination was found to be evident regardless of whether or not such discrimination was purposeful. "Where a regulation discriminates, by benefitting one class to the burden of another, either on its face or in its application, the court must view the regulation with strict scrutiny." *Hughes v. Oklahoma*, 441 U.S. 322, 329 (1979). Moreover, as this Court has held in *City of Philadelphia v. New Jersey, supra*, it is not necessary for a regulation to effectuate a one way ban on the movement of interstate commerce for it to be found to be discriminatory:

> It does not matter that the state has shut the article of commerce inside the state in one case and outside the state in the other. What is crucial is the attempt by one state to isolate

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4. This Court has also applied the strict scrutiny standard where a regulation undermines uniformity in areas of particular federal importance. *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986). Consequently, Petitioner also contends that, since the regulation effectively defeats the primary purpose of RCRA, to provide uniform regulation of hazardous wastes on a national scale (*see* Argument I), two separate grounds exist for why this Court should apply the strict scrutiny standard of review.

> itself from a problem common to many by erecting a barrier against the movement of interstate trade.

Id. at 628.

However, the Third Circuit refused to apply this Court's anti-discrimination principle to the challenged regulations. It reasoned:

> [T]his court has interpreted the Supreme Court's 'discriminatory effect' cases to be cases of purposeful discrimination. *See Oberly*, 822 F.2d at 400. Because OBC claims no purposeful discrimination on the part of New Jersey, the strict scrutiny test is inapplicable under the "discriminatory effect" rationale.

App., *infra*, 19a.

This Court's decisions, however, expressly and conclusively reject the Third Circuit's distinction based on legislative motivation. For example, in *City of Philadelphia, supra*, New Jersey contended that its legislation banning out-of-state wastes was designed to protect the " 'health safety and welfare of the citizenry at large.' " 437 U.S. at 626.[5] The Court found New Jersey's actual motive irrelevant, stating:

> [I]t does not matter whether the ultimate aim of [the statute] is to reduce waste disposal costs of New Jersey residents or to save

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5. These are the exact same reasons propounded by New Jersey to uphold the challenged regulations. However, New Jersey presented no evidence below to prove that regulating a product as a waste would benefit its citizens' health and welfare.

> remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment.

Id. at 626-677.

The Court concluded with the reaffirmation that:

> Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends.

Id. at 617.

This holding echoes numerous previous decisions rendered by this Court consistently finding that legislation may be constitutionally invalid no matter how laudable the legislative intent. *See, e.g., New Energy Co. of Ind. v. Limbach,* 486 U.S. 269 (1988). In fact, just four months ago, the Court held that:

> This narrow focus on the intended consequence of [regulation] does not conform to our precedents, for '[a] finding that state legislation constitutes' economic protectionism' may be made on the basis of either discriminatory purpose'; or discriminatory effect,. . . The 'virtually per se rule of invalidity'. . . applies 'not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade.'

Chemical Waste Management. Inc. v. Hunt, 112 S. Ct. 2009, 2015 n.6 (1992) (citations omitted).

The practical effect of the challenged regulations is to discriminate against out-of-state companies seeking to conduct business in New Jersey, as well as New Jersey companies, such as OBC, which rely upon materials obtained from out-of-state. For example, an out-of-state manufacturer who wishes to ship copper chloride and copper ammonium chloride to New Jersey must place itself in the precarious position of advising the EPA and its own state that it is producing hazardous waste when it is not and subject itself to the possibility that in the attempt to ship these materials through other states to New Jersey, the materials may be misidentified as federally designated hazardous wastes. Not only the producer of the materials, but all subsequent handlers of the materials, subject themselves to fines and penalties incident to the confusion caused by the anomalous coding. Therefore, the out-of-state producers, distributors and transporters of these chemicals have no reason to expend resources to obtain RCRA or equivalent state hazardous waste management permits unless they handle materials recognized as wastes by their own states. NJDEP inadvertently renders the absence of such a permit a formidable roadblock to commerce with New Jersey enterprises such as OBC by requiring that certain chemicals be manifested as though they were universally recognized wastes, and compounds that error by demanding that these chemicals be identified with standard RCRA "D" codes, if they happen to exhibit RCRA hazardous characteristics.

The legitimate fear of incurring liability by trafficking without a hazardous waste permit in "D" coded "wastes", irrespective of the distinct possibility that such coding may be federally erroneous (assuming that one has the means to determine this with certainty), serves to disrupt substantially interstate commerce in such chemicals. Furthermore, as a legal matter, out-

of-state suppliers of these raw materials are foreclosed from complying with NJDEP's aberrational policy by United States Department of Transportation regulations which forbid the use of RCRA hazardous waste numbers within the proper shipping name on transportation documents to identify cargos which are not actually RCRA hazardous. 49 C.F.R. 172.202(e). This prohibition presumably applies with equal force to New Jersey companies who, although they are compelled to comply with NJDEP's regulations, wish to send such chemicals to other states. In such circumstances, for the reasons described above, out-of-state recipients without hazardous waste management permits will be loathe to accept shipments of these misidentified materials as documented. Thus, interstate commerce is effectively impeded in *both* directions.

By implementing the challenged regulations, New Jersey not only discriminates against interstate commerce but regulates beyond its borders. It effectively regulates conduct in all states from which the materials originate, and each state through which the materials must pass on their way to New Jersey. For example, if an out-of-state company decides to ship the materials to New Jersey, its own home state must decide if it wishes to similarly enforce the same storage, inspection and record-keeping regulations applicable to generators of federally designated hazardous wastes, or carve out an exception in the administrative processing of this New Jersey only hazardous waste, and New Jersey only hazardous waste generator. Such an outcome whereby one state attempts to regulate processes occurring in another, is to be strictly prohibited. Lawrence H. Tribe, *American Constitutional Law*, 435 (2d ed. 1988).

In light of the above, the decisions below cannot be reconciled with this Court's consistent holdings that heightened scrutiny should be applied to legislation which causes a discriminatory effect. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. at 522-524; *Maine*

v. Taylor, 477 U.S. 131, 148-149 n. 19 (1986).

The Third Circuit's unjustifiably narrow understanding of this Court's precedents resulted in the erroneous conclusion that a strict scrutiny analysis was not appropriate in this case. Due to this error, the Court failed to properly weigh New Jersey's contention that regulating these already regulated materials as wastes protects the health and welfare of its citizens, and Petitioner's legitimate proposition that this stated purpose can be served as well, if not better, by adopting state specific hazardous waste codes.

A. Lower Courts Are in Need of Guidance in Determining When to Apply a Strict Scrutiny Analysis to Legislation Which Discriminates Against Interstate Commerce in its Practical Effect.

Lower courts are divided on the appropriate standard of review when a challenged regulation is deemed to have a discriminatory effect without evidence of a discriminatory motive. This Court heard argument on the proper role of such evidence in *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249 (1990), but did not reach the question because subsequent federal legislation rendered the case moot. This important issue can be resolved by reviewing and deciding the substantive issues presented by the Petitioner.

For example, in *National Solid Wastes Management Ass'n v. Alabama Department of Environmental Management*, 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001, *cert. denied*, 111 S. Ct. 2800 (1991), the Eleventh Circuit opined that the legislation at issue was an "honorable and well intentioned" attempt to "come[s] to grips with environmental problems", 910 F.2d at 725, but nevertheless struck it down where it subjected out-of-state waste to stricter regulation.

In *Division of Alcoholic Beverages and Tobacco v. McKesson*

Corp., 524 So:2d 1000, 1008 (Fla. 1988), *rev'd on other grounds*, 110 S.Ct. 2238 (1990), the Florida Supreme Court struck down a liquor tax because it disproportionately benefited in-state products at the expense of out-of-state products in its application. Several other lower courts have also followed this Court's precedents and invalidated legislation which discriminates against interstate commerce without evincing a discriminatory motive. For example, the Ohio Supreme Court invalidated a state-imposed tax scheme because it discriminated in its practical effect against out-of-state coal in *Dayton Power & Light Co. v. Lindley*, 58 Ohio St.2d 465, 391 N.E. 2d 716 (1979).

However, other courts like the Third Circuit have refused to apply the strict scrutiny analysis in spite of evidence proving a discriminatory effect upon interstate commerce. In *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984), the Colorado Supreme Court upheld a tax that, in its effect, excluded over 75% of out-of-state producers of gasohol.

Because this issue has arisen with great frequency and resulted in conflicting decisions, clarification from this Court in the instant case will provide necessary guidance for the lower courts to follow.

CONCLUSION

In light of the profound public policy issues raised by the validation of the challenged New Jersey regulations, Petitioner believes that review of the decision below is warranted. Petitioner respectfully requests that its Petition For A Writ of Certiorari be granted.

Respectfully submitted,

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CAPLAN & LUBER
Attorney for Petitioner
Old Bridge Chemicals, Inc.

APPENDIX A — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 8, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5789

OLD BRIDGE CHEMICALS, INC.,

Appellant

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 90-02546)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and ROSENN, *Circuit Judges*

The petition for rehearing filed by the appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ illegible
Circuit Judge

DATED: July 8, 1992

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 10, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-5789

OLD BRIDGE CHEMICALS, INC.,

Appellant

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Appeal from the United States District Court
for the District of New Jersey
D.C. No. 90-02546

Present: Greenberg, Scirica and Rosenn, *Circuit Judges*

JUDGMENT

This cause came on the be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel April 10, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the summary judgment of the said District Court entered September 4, 1991, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

Appendix B

ATTEST:

s/ Sally Mrvos
Clerk

Dated: June 10, 1992

Certified as a true copy and issued in lieu
of a formal mandate on July 16, 1992.

Test: s/ Sally Mrvos

Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 10, 1992

Filed June 10, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5789

OLD BRIDGE CHEMICALS, INC.,

Appellant,

vs.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Appeal from the United States District Court
for the District of New Jersey
D.C. No. 90-02546

Argued April 10, 1992
Before: GREENBERG, SCIRICA, and ROSENN,
Circuit Judges

Opinion Filed June 10, 1992

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Appendix C

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OPINION OF THE COURT

ROSENN, *Circuit Judge.*

This appeal presents questions arising from a state's regulatory scheme for the disposition and management of toxic wastes within its jurisdiction and a potential conflict with the commerce clause of the federal constitution and congressional legislation. The New Jersey Department of Environmental Protection (NJDEP), the agency charged with the promulgation and enforcement of regulations governing waste management in the State of New Jersey, enacted a regulatory program governing the management of hazardous wastes. Old Bridge Chemicals, Inc. (OBC) claims that the regulations relating to recyclable by-product hazardous wastes violate the commerce clause and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.* OBC sought relief in the United States District Court for the District of New Jersey to enjoin NJDEP from using RCRA hazardous waste Codes to identify this class of hazardous waste. OBC also sought a declaration that New Jersey's definition of solid waste, without state-specific waste codes, violates the commerce clause. The district court entered summary judgment for the New Jersey

Appendix C

Department of Environmental Protection. OBC appealed and we affirm.

I.

OBC is a chemical manufacturing company chartered under New Jersey laws with gross annual sales approaching $20 million. For twenty years, it has purchased chemicals, including zinc oxide, sulfuric acid, copper sulfate solution and crystals, copper chloride, and copper ammonium chloride, from out-of-state companies. These out-of-state companies produce the chemicals as necessary adjuncts to the manufacture of primary marketable commodities. OBC uses them in the production of pure, basic chemicals for sale to agriculture, water treatment, dry cell battery and textile industries.

Under the New Jersey Solid Waste Management Act, NJDEP has the responsibility to promulgate and update rules and regulations concerning the State's waste management. N.J. Stat. Ann. § 13:1E-6. In 1987, NJDEP adopted a revised definition of "solid waste," which made its definition of solid waste more expansive and stringent than the federal definition.[1] Although the federal definition excludes any materials recycled "as effective substitutes for commercial products," 40 C.F.R. § 261.2(e)(1)(ii), New Jersey's amended definition includes "by-product" materials that are recycled.[2] N.J.A.C. 7:26-1.6(b)5. As a consequence of the new regulations, many of the raw materials used by OBC are

1. The rule amendments at issue in this litigation were adopted effective December 21, 1987, and along with all other NJDEP waste management regulations, were readopted effective October 25, 1990 with an expiration on that date in 1995.

2. N.J.A.C. 7-26-1.4 defines a "by product" as

(Cont'd)

now classified as solid wastes under the New Jersey definition notwithstanding their exemption from federal regulation. In addition, under both the federal and state regulations, a substance considered a "hazardous waste" must first classify as a solid waste. *See* 40 C.F.R. § 261.3; N.J.A.C. 7:26-1.4. Because NJDEP's definition of "solid waste" includes by-product materials that are recycled, such materials may be hazardous only under the New Jersey scheme.

On January 11, 1990, NJDEP notified OBC that virtually all of OBC's imported raw materials were by-product solid wastes subject to New Jersey's hazardous waste regulations. Under NJDEP expanded regulations, OBC's imported raw chemicals copper chloride and copper ammonium chloride further classify as by-product solid wastes exhibiting hazardous waste characteristics and are thus hazardous wastes. *See* N.J.A.C. 7:26-8.1(v). OBC concedes that these raw materials are of a hazardous nature.

Under the New Jersey scheme, these recyclable hazardous wastes must be labelled and identified for record keeping and recording purposes by their characteristic EPA hazardous waste code, even if they originate from out-of-state sources. *See id.* 7:26-8.5(e), 8.8(e). In addition, although RCRA does not require shipments of such recyclable hazardous wastes to be done "under manifest," New Jersey requires that shipments of these wastes to and from the State be made pursuant to the State's manifest system, modelled after RCRA's. A manifest is a document used to identify the quantity, composition, and the origin, routing,

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(Cont'd)

> a material that is not one of the primary products of a production process and is not solely or separately produced by the production process . . .

and destination of hazardous wastes during their transportation. 42 U.S.C. § 6903(12). It provides a "cradle to grave" means for tracking hazardous wastes through a paper trail from the point of generation to the point of treatment, storage, or disposal. *Id.*

For wastes originating in or destined for points in New Jersey, a generator[3] of hazardous waste must complete a RCRA Uniform Hazardous Waste Manifest, RCRA's manifest for hazardous wastes adopted by NJDEP regulations. N.J.A.C. 7:26-7.4(a)(3); 40 C.F.R. § 262 app. The Uniform Manifest requires, inter alia, information regarding the particular nature of the hazardous wastes, and the generator and transporter of the wastes. The Uniform Manifest also requires the generator's EPA identification number, a number unique to each generator of hazardous waste.

To obtain an EPA identification number, the generator must file a Form 8700-12 entitled "Notification of Regulated Waste Activity" with the EPA. This form, which is designed in part to help companies determine whether and how they must comply with RCRA notification requirements, specifically designates a space labelled "other wastes" that is reserved for listing "state or other wastes requiring an I.D. number." The instructions for completing this form advise generators that "[m]any States have requirements that vary from the Federal regulations. These State regulations may be more strict than the federal requirements by identifying additional wastes as hazardous . . . " Companies are informed that they are required to learn about and comply with all state regulations that apply to them and are "strongly urged" to contact the appropriate state hazardous waste contact agencies,

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3. A "generator" is a person, by site, whose act or process produces solid waste or whose act first causes solid waste to become subject to regulation. N.J.A.C. 7:6-1.4.

alphabetically listed with addresses and phone numbers in the instructions accompanying the form.

Before allowing the hazardous waste to leave its property, the generator must forward one copy of the Uniform Manifest to the state of origin and one copy to the state of destination. N.J.A.C. 7:26-7.4(a)(5)(iii). Additional notification requirements apply for shipments by railroad or water. *Id.* 7:26-7.4(a)(7), (8). Although the shipment of hazardous wastes by manifest is a federal requirement, RCRA expressly allows a state to require a copy of each manifest used in connection with hazardous waste generated within that state or transported to a treatment, storage, or disposal facility within the state. 42 U.S.C. § 6929 (West Supp. 1992).

OBC does not object to New Jersey's more expansive definition of "solid waste," but argues that New Jersey's use of the RCRA hazardous waste codes creates a detrimental impact upon interstate commerce because it appears that such coding *ipso facto* renders New Jersey-only hazardous wastes subject to nationally restrictive RCRA hazardous waste regulations in interstate shipment. OBC asserts that as a consequence, its out-of-state suppliers are refusing to continue to sell such recyclable by-product materials to OBC or are threatening to withdraw as suppliers because they do not wish to be burdened by New Jersey's requirements for manifesting, labelling, and transporting, non-federally designated hazardous wastes. They fear that identifying their routinely marketed products as federal hazardous wastes could subject them to federal regulatory liability as unlicensed hazardous waste generators or transporters. OBC claims that these potential losses to its sources of supply may force it to close its operations.

Appendix C

II.

In deciding this case, we recognize the serious difficulties inherent in hazardous waste management, particularly in the State of New Jersey. As we have previously noted, the disposition of solid waste in New Jersey "has been in a state of crisis since the midseventies, and continues to be 'one of [the] state's most severe problems.' " *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection,* 857 F.2d 913, 918 (3rd Cir. 1988) (quoting *A.A. Mastrangelo, Inc. v. Commissioner of Dep't of Envtl. Protection,* 90 N.J. 666, 670-671, 449 A.2d 516, 518-19 (1982)). However, solid waste is an increasingly common commodity of interstate commerce, *City of Philadelphia v. New Jersey,* 437 U.S. 617, 621-23 (1978); therefore, New Jersey's regulations must be consistent with the dictates of the commerce clause. In addition, although the State is understandably driven to correct the public health and safety problems posed by hazardous wastes, New Jersey, in its efforts to do so, must not contravene RCRA.

In interpreting the applicable federal legislation and regulations to determine Congress's intent, and in interpreting New Jersey's regulations to determine whether they comport with the Constitution and the federal environmental scheme, our role is not to pass judgment on the effectiveness and wisdom of the particular state regulations at issue, but only to apply the law as we find it. We conduct a plenary review of the district court's decision to ascertain whether the record reveals any disputed issues of material fact and whether NJDEP, as moving party, is entitled to summary judgment as a matter of law. *Arnold Pontiac-GMC, Inc. v. General Motors Corp.,* 786 F.2d 564, 568 (3rd Cir. 1986).

Appendix C

A Commerce Clause Claim

The commerce clause specifically grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. Art. I. § 8, cl. 3. Although the clause does not expressly limit state interference with interstate commerce, the Supreme Court nonetheless has historically held that the clause prohibits states from taking certain actions regarding interstate commerce even absent congressional action. *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 87 (1987). The Constitution itself does not articulate the boundaries of the commerce power vested in Congress, particularly when Congress remains silent, and it has been left to the Court to interpret the self-executing limitations that the clause sets on the scope of permissible state regulation. The clause, as applied by the judiciary, "acts as a limitation on the authority of the states designed to preclude the establishment of protectionist state barriers that would threaten the operation of the federal union." *Norfolk Southern Corp. v. Oberly,* 822 F.2d 388, 407 (3rd Cir. 1987).

In analyzing the scope of the dormant commerce clause, this court has articulated three standards of review:

> (1) state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance are given heightened scrutiny;
>
> (2) legislation in areas of peculiarly strong state interest is subject to very deferential review; and
>
> (3) the remaining cases are governed by a balancing rule, under which state law is invalid

> only if the incidental burden on interstate commerce is clearly excessive in relation to the putative local benefits.

Juzwin v. Asbestos Corp., 900 F.2d 686, 689 (3rd Cir.), *cert. denied*, 111 S. Ct. 246 (1990); *Oberly*, 822 F.2d at 398-99.

OBC argues that NJDEP's regulations are subject to a strict scrutiny review, while NJDEP argues that a balancing test is appropriate.[4] In deciding which test applies, we bear in mind that the Supreme Court has recognized that no clear line distinguishes those regulations subject to heightened scrutiny, which will almost always be invalidated and the category reviewable under a balancing test. *J. Filiberto*, 857 F.2d at 919.

1. Heightened Scrutiny

OBC argues, citing to *Maine v. Taylor*, 477 U.S. 131 (1986), that the New Jersey regulations are subject to heightened scrutiny, with the burden falling upon the State to demonstrate both that the regulations serve a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means. As the party attacking the regulation, OBC had the burden on NJDEP's motion for summary judgment of showing the existence of discrimination. *J. Filiberto*, 857 F.2d at 919.

Heightened scrutiny is appropriate here, according to OBC,

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4. Neither party argues that we should review NJDEP's regulations under the third type of dormant ommerce clause review, the "deferential review." In addition, we have recognized that neither this court nor the Supreme Court has ever applied such a deferential standard to nondiscriminatory environmental statutes. *Oberly*, 822 F.2d at 405.

because NJDEP regulations undermine uniformity in an area of particular federal importance. OBC argues that hazardous wastes implicate such broad and complex national concerns that supervision by a federal agency (the EPA) and federal laws specifically dealing with the management of hazardous wastes and the remediation of existing contamination (RCRA and "CERCLA") are necessary. It contends that NJDEP's borrowing of RCRA codes undermines the uniformity of this federal hazardous waste scheme because labeling state-only wastes with RCRA codes gives the appearance that these wastes are hazardous under RCRA, thereby causing individuals to second guess the otherwise uniform Act. In addition, we are reminded that if we uphold New Jersey's scheme, other states will be encouraged to adopt their own unique system for identifying hazardous wastes, thus further disrupting the uniformity of the federal waste codes.

The commerce clause prohibits states from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation." *CTS Corp. v. Dynamics,* 481 U.S. at 88-89 (quoting, *Cooley v Board of Wardens,* 12 How. 299, 319 (1852)). Therefore, as stated, we apply the heightened scrutiny test as a standard of review when a regulation undermines uniformity in an area of particular federal importance. *Juzwin,* 900 F.2d at 689; *Oberly,* 822 F.2d at 398-99.

It is undisputed that hazardous waste management is an area of national importance. Congress passed RCRA in 1976 as the principal federal statute regulating the generation, transportation, and disposal of hazardous wastes, stating that the problems of waste disposal had "become a matter national in scope and in concern and necessitat[ed] federal action." 42 U.S.C. § 6901(a)(4). However, although waste management may be an area of

overriding national importance, in legislating in this field Congress has set only a floor, and not a ceiling, beyond which states may go in regulating the treatment, storage, and disposal of solid and hazardous waste.

On the contrary. RCRA expressly allows states to adopt more stringent "requirements" than those imposed by the EPA regulations, although states may not impose any regulations less stringent than the floor set by RCRA. The "savings clause" of RCRA states:

> [N]o State . . . may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations . . . Nothing in this chapter shall be construed to prohibit any State . . . thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

Id. § 6929. This express provision of RCRA reveals a congressional intent that hazardous waste is not an area of *particular* federal importance requiring one, uniform, national system or plan of regulation. In fact, although Congress recognized the need for federal regulation, it stated that "the collection and disposal of solid waste should continue to be primarily the function of the State." *Id.* § 6901(a)(4).

The structure of EPA's Form 8700-12 is further evidence that RCRA envisions a dual federal-state system of hazardous waste regulation, with states able to categorize additional wastes as hazardous. This form specifically designates a space reserved for listing state regulated wastes, and advises originators of hazardous

waste that "[m]any States have requirements that vary from the Federal regulations which] *may be more strict than the federal requirements by identifying additional wastes as hazardous.*" (Emphasis added). The form reveals that the EPA contemplates that RCRA enables states to designate wastes as hazardous beyond those RCRA designates as hazardous.

Moreover, there is no congressional intent to preempt the entire field of interstate waste management or transportation. *City of Philadelphia,* 437 U.S. at 620 and n.4. This provides further evidence that Congress did not intend RCRA to assume overriding federal importance at the expense of the states' sovereign power to enact more stringent, but not conflicting, state regulation. Thus, the heightened scrutiny applied to state statutes undermining uniformity in areas of particular federal importance is not implicated because the federal statutory and regulatory framework affords states the option to adopt their own, more stringent hazardous waste regulations so long as they do not discriminate against out-of-state interests or favor in-state interests.

We point out that the state regulatory scheme in this case does not result in the "misidentification" of the chemicals under manifest, as OBC claims. Any New Jersey waste that is required to be labelled with RCRA codes contains the same chemical composition and inherent dangers as the RCRA waste labelled with the corresponding code. The only difference is that RCRA exempts chemicals destined for recycling, but New Jersey does not. New Jersey simply requires that by-product materials be marked with the same code that they would receive under RCRA if they were not recyclable. In this manner, use of the EPA waste codes already familiar to the regulated community actually fosters the uniformity of codes because it immediately communicates the precise chemical nature of the hazardous waste under manifest.

Appendix C

OBC also argues that we should apply heightened scrutiny because NJDEP's regulations subject recyclable by-product materials like copper chloride and copper aluminum chloride to conflicting commands from different states. The Supreme Court has invalidated state statutes where a state has "projected" its legislation into other states and directly regulated commerce therein, thereby either forcing individuals to abandon commerce in other states or forcing other states to alter their regulations to conform with the conflicting legislation. *See, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583-84 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982). The Court has acted similarly where a state statute created contradictory and inconsistent state regulation of vehicles which burdened interstate transportation. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981).

For several reasons, the regulations at issue here do not pose such problems. First, OBC has not pointed to regulations of other states which *conflict* with the New Jersey solid waste regulations. OBC merely asserts that unlike New Jersey, other states do not define the above mentioned by-product materials as solid wastes. "Although the Supreme Court has at times invalidated a state regulation because of the *possibility* that it might conflict with another state's regulation, in more recent cases the Court has required a demonstration of actual conflict." Lawrence H. Tribe, *American Constitutional Law*, 435 (2d ed. 1988). As there is no actual conflict among state regulations. NJDEP's regulations do not burden interstate commerce with "*inconsistent* regulations." In addition, New Jersey is not "projecting" its legislation into other states. Nor does OBC claim that NJDEP's regulations require out-of-state companies to abandon commerce in other states or require other states to alter their waste management schemes to conform with New Jersey's.

Thus, we conclude, as did the district court, that the appropriate test for evaluating NJDEP's regulations is not heightened scrutiny, but rather the balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). This choice is consistent with *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1980) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

In *Clover Leaf Creamery*, the Supreme Court reviewed a state environmental statute banning the sale of milk in plastic non-returnable, non-refillable containers. The Court stated: "If a state law purporting to promote environmental purposes is in reality 'simple protectionism,' we have applied a 'virtually *per se* rule of invalidity.' "449 U.S. at 471 (quoting *City of Philadelphia*, 437 U.S. at 624). The Court then held that the state law did not effect "simple protectionism," but "regulate[d] evenhandedly" because it prohibited *all* milk retailers from selling milk in the plastic bottles, regardless of whether the milk, the containers, or the sellers emanated from outside the state. *Id.* at 471-72. Therefore, the Court concluded, the statute differed from other statutes discriminating against interstate commerce which it had consistently struck down. *Id.* Because the statute did not discriminate between interstate and intrastate commerce, the Court applied the *Pike* balancing test. *Id.*

On the other hand, in *City of Philadelphia*, the Court struck down as protectionist a New Jersey environmental statute that banned the importation into the state's landfills of most solid or liquid waste originating outside of the state. The Court stated that the statute would not have violated the commerce clause, even if the statute incidentally had affected interstate commerce, had New Jersey chosen to slow[] the flow of *all* waste into the State's remaining landfills." 437 U.S. at 626. *See also CTS Corp. v. Dynamics*, 481 U.S. at 88 (rejecting claim of discrimination

where state statute, imposed same burden on in-state and out-of-state security tender offerors); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 619 (1981) (rejecting a claim of discrimination because the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers").

As in *Clover Leaf Creamery,* here OBC does not sufficiently claim that NJDEP's regulations are grounded in protectionism.[5] The regulations are not an example of the "simple protectionist" legislation meriting a strict scrutiny analysis. Rather, the regulations apply evenhandedly to in-state and out-of-state companies and therefore merit a balancing test analysis. *Accord Old Coach Dev't,* 881 F.2d at 1231 (*Pike* test applicable where statute is facially neutral and does not have a discriminatory purpose); *J. Filiberto,* 857 F.2d at 919 (*Pike* test applies if state environmental statute "seeks to achieve [a legitimate] goal by means that do not transfer the burden of the solution onto out-of-state interests"); *Oberly,* 822 F.2d at 405 (*Pike* balancing test "is the appropriate tool for evaluating environmental statutes which impose incidental burdens on interstate commerce"); *cf. National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management,* 910 F.2d 713, 720 (11th Cir. 1990) (heightened

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5. A state law may constitute "economic protectionism" on proof of either discriminatory purpose or discriminatory effect. *Clover Leaf Creamery,* 449 U.S. at 471 n.15. OBC does not contend that the New Jersey regulations have a discriminatory purpose, but argue that the effect of the regulations is discrimination against out-of-state companies. However, this court has interpreted the Supreme Court's "discriminatory effect" cases to be cases of purposeful discrimination. *See Oberly,* 822 F.2d at 400. Because OBC claims no purposeful discrimination on the part of New Jersey, the strict scrutiny test is inapplicable under the "discriminatory effect" rationale.

scrutiny applied to protectionist state environmental statute).[6]

2. The Balancing Test

The *Pike* balancing test, applicable to nondiscriminatory state environmental statutes, requires:

> [I]f a statute regulates "evenhandedly" and imposes only "incidental" burdens on interstate commerce, the courts must nevertheless strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Moreover, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities" *Ibid.*

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6. OBC argues that NJDEP's regulations may be discriminatory, implicating a strict scrutiny analysis, even though they affect in-state as well as out-of-state interests. For this proposition, OBC relies on *Bibb N. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), in which the Supreme Court invalidated a state statute that required all trucks originating from either in-state or travelling interstate to install curved mudguards.

We reject OBC's reasoning because it runs counter to *Clover Leaf Creamery, CTS Corp. v. Dynamics*, and *Commonwealth Edison Co. v. Montana*, where the Court rejected claims that state statutes were discriminatory because the statutes applied "even-handedly" without regard to whether the commerce came from out-of-state. As we have observed, the Supreme Court "has found facially evenhanded legislation to have a discriminatory effect only where the state law advantages in-state businesses in relation to out-of-state businesses." *Oberly*, 822 F.2d at 402; *J. Filiberto*, 857 F.2d at 921.

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Clover Leaf Creamery, 449 U.S. at 471.

Under this court's precedent, the only incidental burdens on interstate commerce that implicate the commerce clause under this balancing test are those that discriminate against interstate commerce. *See J. Filiberto,* 857 F.2d at 922; *Oberly,* 822 F.2d at 406. We have so held because the commerce clause is concerned with protectionism and the need for uniformity, and case law demonstrates that legislation will not be invalidated under the *Pike* test unless it imposes *discriminatory* burdens on interstate commerce. *Oberly,* 822 F.2d at 406; *see also, City of Philadelphia,* 437 U.S. at 624 ("incidental burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people").

Thus, where the burden on out-of-state interests rises no higher than that placed on competing in-state interests, it is a burden on *commerce* rather than a burden on *interstate* commerce. *Oberly,* 822 F.2d at 406. Because "nothing in Commerce Clause jurisprudence entitles out-of-state interests to more strict judicial review than that to which the in-state interests are entitled," we must determine the degree to which NJDEP regulations incidentally discriminate against interstate commerce relative to intrastate commerce. *Id.*

A challenged regulation is discriminatory when it confers advantages upon in-state economic interests, either directly or through imposition of a burden upon out-of-state interests, as against out-of-state competitors. *J. Filiberto,* 857 F.2d at 919. The district court reasoned that the challenged regulations burdened all commerce, not just interstate commerce, inasmuch as both New Jersey producers and OBC's out-of-state producers of the solid waste hazardous materials were required to abide by

the manifest requirements. The court concluded that because the need for uniformity was not at issue and the challenged regulations applied even-handedly to all, the regulations imposed no burden on interstate commerce. In addition, because NJDEP 's regulations did not impose an incidental burden on interstate commerce, any further discussion of the "putative benefits" of the regulations was unnecessary.

We agree with the district court's analysis. OBC does not demonstrate that the regulations impose any greater burden on interstate commerce than they do on intrastate commerce. Generators of hazardous waste, both in-state and out-of-state, are required to identify the recyclable by-product materials using the appropriate RCRA codes and to transport these materials under manifest. Any New Jersey company seeking to supply OBC with the same hazardous by-product materials must comply with the same labelling and manifest regulations as out-of-state shippers.[7] The district court correctly concluded, therefore, that NJDEP regulations create no incidental burden on *interstate* commerce, but instead burden all commerce. Because there is no burden on interstate commerce, an analysis of the "putative benefits" of NJDEP regulations is unnecessary. *See Id.* at 922.[8]

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7. The NJDEP explains that it regulates the recyclable by-product wastes exempt from RCRA because it believes that the nature of the material, not its intended use, should govern the way the material should be handled. New Jersey believes that materials of a hazardous nature should be handled as hazardous wastes so as to best protect the State's public health and safety during the transportation, storage, and treatment of those materials, whether they are ultimately disposed of or recycled, and whether the source of the material is in-state or out-of-state.

8. It follows that because OBC cannot demonstrate a burden on interstate

(Cont'd)

Appendix C

Our result in this case is consonant with our decision in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 888. In *Oberly*, we reviewed a Delaware coastal zone statute banning product transfer facilities in Delaware's coastal zone. Plaintiffs, who sought to initiate a coal lightering service in Delaware Bay, alleged that the statute burdened interstate commerce by precluding coal exporters from lowering their average transportation costs. In conducting the *Pike* balancing test, we observed that this kind of burden was not a legally relevant incidental burden, because it was shouldered by any coal transporter, regardless of state affiliation. Finding no burden that discriminated against out-of-state interests or in favor of in-state interests, we concluded that the statute did not violate the commerce clause. *Id.* at 407. *See also Clover Leaf Creamery*, 449 U.S. at 473 (no incidental burden where "no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms"); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960) ("State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.")

In sum, we conclude that NJDEP regulations do not burden interstate commerce. OBC argues that NJDEP could rectify the whole problem by creating unique codes for the recyclable by-product hazardous waste as it has done for waste oils, thereby enabling New Jersey to monitor the transportation of such materials within the State without implying to other states that the materials are RCRA hazardous wastes. It seems to us that the use of the EPA codes accompanied by a manifest listing the

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(Cont'd)
commerce, we need not consider the *Pike* analysis involving alternative, less burdensome measures available to the State, and therefore decline to consider the relative value of alternatives to New Jersey's present scheme as OBC urges.

waste as a New Jersey-only hazardous waste has the same effect as using state-specific codes. Nevertheless, whether OBC's particular solution to New Jersey's environmental concerns is wise or practical is not for us to decide but for the New Jersey state legislature to consider. As the district court aptly observed (quoting *Exxon Corp. v. Maryland,* 437 U.S. 117, 127-28 (1978)), this argument "relates to the wisdom of the statute, not to its burden on interstate commerce."

B. RCRA Claim

OBC next argues that NJDEP's regulation classifying the recyclable by-product materials as solid waste is facially inconsistent with RCRA and therefore disrupts the uniform federal regulatory scheme pertaining to hazardous wastes management. We disagree. RCRA's "savings clause" expressly provides that a state is not precluded from adopting more stringent requirements than those imposed by the EPA regulations. 42 U.S.C. § 6929. In explaining this clause, Congress stated that the regulations promulgated by the EPA were to be "the minimum standards applicable to hazardous waste management." 1976 U.S.C.C.A.N. 6238, 6269. Thus, RCRA sets a floor, not a ceiling, for state regulation of hazardous wastes. Accordingly, NJDEP regulations are consistent with the clear language and intent of RCRA.

In addition, state regulations that differ from federal regulations do not necessarily violate the federal act because RCRA expressly permits more stringent state regulations. Therefore, a mere inconsistency between the state and federal schemes does not constitute a violation of RCRA. *Accord General Electric Co. v. Flacke,* 461 N.Y.S.2d 138, 118 Misc. 2d. 729 (1982) (state environmental regulation's definition of "waste" which included reused or recycled materials was not inconsistent with RCRA

because RCRA "allows states to require stricter and more stringent standards than the federal program.")

Moreover, OBC's assertion that the regulations pose a threat to the uniformity of the RCRA identification system is suspect in light of the availability of two spaces on the manifest form for identifying the transported wastes as "New Jersey special wastes not subject to federal RCRA requirements," thereby simply removing any doubt that the materials are RCRA wastes and any consequent threat to the uniformity of RCRA. Further, as we observed earlier, use of the RCRA codes actually enhances the uniformity of the federal codes because the New Jersey-only wastes contain the same chemical composition and inherent dangers as the corresponding RCRA wastes. Finally, out-of-state manufacturers solely shipping recyclable by-product materials to New Jersey need not fear federal liability for shipping non-federally designated wastes because they may inform the EPA on their Form 8700-12 that they will be shipping New Jersey-only hazardous wastes.

III.

In summary, NJDEP's hazardous waste regulations defining recyclable by-products as solid wastes and requiring such wastes, if hazardous, to be marked with EPA codes, do not violate the commerce clause. OBC fails to make the showing of discrimination or threat to uniformity in an area of particular federal importance necessary to implicate heightened scrutiny. Under the *Pike* balancing test, the New Jersey scheme is constitutional as it does not burden interstate commerce. Further, there has been no showing of a violation of RCRA stemming from New Jersey's use of the federal waste codes. Accordingly, the district court's summary judgment will be affirmed.

Appendix C

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D — ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED SEPTEMBER 4, 1991

Civil Action
No. 90-2546

OLD BRIDGE CHEMICALS, INC.,

Plaintiff,

vs.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant.

ORDER

This matter having been opened to the Court upon the motion of defendant for summary judgment on plaintiff's amended complaint, and the court having considered the submissions of the parties both in support of and in opposition to the motion,

It is on this 4th day of September, 1991, for the reasons set forth in this court's opinion of even date,

ORDERED that defendant's motion for summary judgment is hereby granted.

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

Appendix D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 90-2546 (MTB)

OLD BRIDGE CHEMICALS, INC.,

Plaintiff,

vs.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant.

OPINION

BARRY, DISTRICT JUDGE

I. INTRODUCTION

Plaintiff Old Bridge Chemicals, Inc. ("OBC") commenced this action for declaratory and injunctive relief against defendant New Jersey Department of Environmental Protection ("NJDEP") alleging that NJDEP's solid waste regulations violate the Commerce Clause of the Constitution of the United States and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*

More specifically, Count One, which seeks injunctive relief, alleges that the failure of the NJDEP to promulgate state specific waste identification codes for recycled materials alleged to be "by

products" which are not deemed to be wastes under RCRA burdens interstate commerce and is violative of the Commerce Clause. Count Two seeks a declaration that New Jersey's "expansive" definition of solid waste is violative of the Commerce Clause because of the absence of state-specific codes applicable to the "by product" solid wastes not deemed hazardous under RCRA. Count Three alleges that New Jersey's hazardous waste regulations violate RCRA in that they are facially inconsistent with RCRA hazardous waste code regulations and, as applied, are disruptive of the uniform federal scheme for identifying and managing the interstate movement of hazardous wastes.

The "root of the problem", plaintiff explains, is NJDEP's requirement that "certain materials, not deemed to be solid wastes under RCRA, which are shipped in interstate commerce, be manifested as though they were federally hazardous wastes and identified with standard RCRA, characteristically hazardous waste numbers." Pl. Br. at 9. Thus, argues plaintiff, there is a detrimental impact upon interstate commerce because of the obligation Imposed by NJDEP's regulations to mislabel, as nationally recognized hazardous wastes, certain materials which only New Jersey defines as wastes at all. Additionally, the use of the RCRA codes has created an impermissible waste identification inconsistency which undermines the integrity of the uniform federal hazardous waste identification system. *Id.* at 11, 21.

According to plaintiff, out-of-state manufacturers of the raw materials are refusing to continue to sell the materials to plaintiff or are threatening to withdraw as suppliers due to a fear they could be subject to federal liability as "unlicensed" hazardous waste generators and/or transporters. Plaintiff claims that as a

consequence of these alleged losses or sources of supply, it may be forced to shut down. Amended Complaint, ¶¶12-14.

NJDEP now moves for summary judgment on all three of plaintiff's claims. For the reasons set forth below, the motion will be granted in its entirety.[1]

II. FACTS

Plaintiff OBC is a chemical manufacturing company located in Middlesex County, New Jersey, with gross annual sales approaching $20 million. For twenty years, plaintiff has purchased chemicals, including zinc oxide, copper sulfate, copper chloride, copper ammonium chloride and sulfuric acid, from out-of-state companies and uses them in the production of pure, basic chemicals for sale to other industries involved in agriculture, water treatment, dry cell battery manufacturing and textiles. Amended Complaint ¶4.

In 1987 NJDEP adopted and published a revised definition of "solid waste." *See* N.J. Admin. Code 7:26-1.6. This revision, made New Jersey's definition more expansive and more stringent than the federal definition of solid waste. *Compare* 40 C.F.R. § 261.2 (1990). More particularly, while the federal definition excludes any materials recycled "as effective substitutes for commercial products," *See* 40 C.F.R. § 261.2 (e)(l)(ii), New Jersey now considers any recycled "by-product" material as solid waste. Thus, the materials used by plaintiff fall squarely within the

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1. In this motion for summary judgment the Court must accept as true all of the facts as alleged by plaintiff. *See* Fed.R.Civ.P. 56(c). *See also Anderson v. Liberty*, 477 U.S. 242, 247-48 (1985).

exclusion in the federal definition of solid waste, but are included within the New Jersey definition. Amended Complaint ¶7. In addition, New Jersey deems solid waste to be hazardous if "it exhibits characteristics of hazardous waste identified in N.J. [Admin. Code] 7:26-8.9 through 8.12." *See* N.J. Admin. Code 7:26-8.1(a)iv. The materials used by plaintiff are hazardous under these regulations as well, but are not hazardous under federal regulations, again because of the exclusion in the federal definition of solid waste.

Thus, under New Jersey's regulatory scheme, solid wastes which are hazardous must be identified for record keeping purposes by the appropriate EPA hazardous waste number from D001 through D017. Amended Complaint, ¶10. Because the materials used by plaintiff are classified using the code used by the EPA, it appears that the materials are hazardous under RCRA when in fact they are only deemed hazardous in New Jersey.

III. DISCUSSION

III(a). Commerce Clause Analysis

The Commerce Clause, contained in Article I, § 8, cl. 3 of the Constitution, is an affirmative grant of power to Congress: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." When Congress has acted pursuant to this plenary power, its laws have pre-emptive effect. It is only when Congress has not acted that the issue of state power — and the "dormant" Commerce Clause — arises.[2] *See Western & Southern Life Ins. v. Bd. of Equalization of California,* 451 U.S. 648, 652 (1980).

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2. Although not immediately relevant to the present discussion, I note as

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Although the Commerce Clause does not explicitly limit state interference with interstate commerce, it is well settled that even in the absence of congressional action, the Commerce Clause "prevents the States from erecting barriers to the free flow of interstate commerce." *See Raymond Motor Transp. Inc. v. Rice,* 434 U.S. 429, 440 (1978). In determining whether a state has violated the "dormant" Commerce Clause, the United States Court of Appeals for the Third Circuit has applied three standards of review. Thus:

> 1) state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance are given heightened scrutiny; 2) legislation in areas of peculiarly strong state interest is subject to very deferential review; and 3) the remaining cases are governed by a balancing rule, under which state law is invalid only if the incidental burden on interstate commerce is clearly excessive in relation to the putative local benefits.

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a preliminary matter that RCRA provides that a state may impose more stringent standards than the federal government in the course of regulating waste. *See* 42 U.S.C. § 6929. Therefore, NJDEP could have argued — although it did not — that Congress affirmatively granted the states the power to "regulate commerce" with respect to waste management. If so, no Commerce Clause issue would arise because when "Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *See Western & Southern Life Ins.*, 451 U.S. at 652-53. In any event, the issue need not be reached in as much as it is clear that the result under the Commerce Clause analysis yields the same outcome as if NJDEP had successfully argued that Congress intended to grant the states the power to regulate the "commerce of waste."

See Juzwin v. Asbestos Corp., Ltd., 900 F.2d 686, 689 (3d Cir. 1990); *Oberly*, 822 F.2d at 398-99. For the reasons which follow, I find that the standard of review to be applied in this case is the third, commonly referred to as "the balancing test."

Parenthetically, I reject plaintiff's assertion that the proper standard to be applied is one of heightened scrutiny, an assertion which plaintiff makes based on its claim that the NJDEP's regulations "undermine uniformity in [an] area[] of particular federal importance."[3] *Id.* I acknowledge that courts have invalidated state statutes when they "adversely affect interstate commerce by subjecting activities to inconsistent regulations." *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1986). State laws and regulations are only required to be consistent with federal law, however, when the specific area of concern is of particular federal importance. The Commerce Clause thus prohibits states from regulating subjects that are in their nature national, and require a uniform system, or plan of regulation. *Id.*, 88-89 (citations omitted). In the absence of a compelling federal interest to have one uniform system, however, the states remain free to otherwise regulate an area while also admitting to federal regulation.

Management of waste has not been deemed by Congress to be of such overriding federal importance that one uniform standard is required. That this is so is evidenced by RCRA itself which

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3. Plaintiff concedes that the regulations do not purposefully discriminate against out-of-state residents, in as much as they are applicable to New Jersey residents as well. *See generally Maine v. Taylor*, 477 U.S. 131, 138 (1986); *City of Philadelphia, v. New Jersey*, 437 U.S. 617 (1978); *Old Coach Development Corp., Inc. v. Tanzman*, 881 F.2d 1227 (3d Cir. 1989). Therefore, heightened scrutiny can only be applied here if there is a peculiar need for national uniformity.

provides that the states may impose more stringent measures with regard to waste management than the federal government. *See* 42 U.S.C. § 6929. It follows inexorably that it is inappropriate to apply heightened scrutiny to this case.[4]

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4. RCRA aside, courts have generally declined to apply heightened scrutiny to cases involving the environment unless some purposeful discrimination against out-of-state citizens exists. In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1980), for instance, the Supreme Court applied the balancing test to a state statute banning the sale of milk in plastic nonreturnable, non-refillable containers and ruled that the statute was valid because environmental concerns, including energy conservation and waste disposal, were of "substantial *state* interest." *Id.* at 473 (emphasis added). The Third Circuit used the balancing test in *Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection*, 857 F.2d 913 (3d Cir. 1988), in which a New Jersey regulation requiring waste to be deposited at a transfer station for processing before disposal elsewhere was at issue. The regulation was upheld after balancing was done and it was determined that the " . . . *local* benefits . . . [were] substantial." *Id.* at 922 (emphasis added). *Compare National Solid Wastes Management Assoc. v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 720 (11th Cir. 1990) (heightened scrutiny applied to a state law which prevented commercial waste management facilities from accepting hazardous wastes generated in other states because the law was protectionist).

Moreover, I reject plaintiff's argument that a heightened scrutiny test should be applied here because it has been applied by the Supreme Court when it has reviewed interstate transportation regulations. The Supreme Court has — at most — only applied a balancing test (or ones similar to it) to transportation regulations. *See e.g. Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671-75 (1980); *Bibb v. Navaho Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1958); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768-71 (1945). Indeed, the general standard for cases involving transportation regulations has been a deferential one. *Raymond Motor Transp.*, 434 U.S. at 443 ("In no field has . . . deference to state regulation been greater than that of highway safety regulation.") *See also American Trucking Assoc. v. Larson*, 683 F.2d 787, 795 (3d Cir. 1982) (applying deferential review to transportation regulations).

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I turn now to an analysis of the claims under the balancing test.[5] The balancing test was first explicated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and provides that courts are obligated to strike down state statutes if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative benefits." *Id.* at 142.

Plaintiff argues that NJDEP's regulations and, more specifically, the "misuse" of the RCRA codes, create a burdensome and chilling impact on interstate commerce which is disproportionate to any putative benefits sought to be achieved. I find this argument unpersuasive. Even assuming that plaintiff's out-of-state suppliers have stopped supplying or are threatening to stop supplying it with materials necessary for it to continue doing business, the challenged regulations survive the balancing test.

With reference to the burden side of the test, the Third Circuit has stated that the measure to be used is a "comparative" one. *See Oberly*, 822 F.2d at 406. The key is whether the challenged legislation imposes a burden on out-of-state residents while not imposing that same burden on in-state residents. As the Court stated in *Oberly:*

> Where the 'burden' on out of state interests is no different from that placed on competing in-state interests, . . . it is a burden on *commerce* rather

5. Neither the Supreme Court nor the Third Circuit has applied deferential review — the second standard of review set forth *supra* at 6 — to non-discriminatory environmental statutes. *Oberly*, 822 F.2d at 405 (citing *Clover Leaf*, 449 U.S. at 472). Since the regulations challenged here are non-discriminatory, deferential review is inapplicable.

> than a burden on *interstate* commerce. . . . [T]he case law makes it clear that ". . . legislation will not be invalidated under the Pike test in the absence of *discriminatory* burdens on interstate commerce.

Id. (emphasis in original).

The challenged regulations in this case "burden" all commerce, not interstate commerce, inasmuch as both New Jersey and out of state producers of the materials that plaintiff requires must abide by the laws of New Jersey. *See Exxon Corp., v. Maryland,* 437 U.S. 117, 126 (1977). Therefore, because the need for uniformity is not at issue, and because the challenged regulations do not discriminate against out-of-state concerns but, rather, are applied even-handedly to all, there is no burden on interstate commerce. *See Filiberto Station,* 857 F.2d at 922 ("[T]he only burden which implicates the Commerce Clause in the balancing analysis are those that discriminate against interstate commerce."). *See also American Trucking,* 683 F.2d at 799. ("[T]he principal function of the Commerce Clause . . . is to prevent discrimination against interstate commerce, [and] once it is conceded that there is no such discrimination . . . the inquire at to the burden on interstate commerce should end.").

There being no burden on interstate commerce, any discuss of the "putative benefits" of the regulations is unnecessary. Stated somewhat differently, no analysis of the benefits of the challenged regulations is required once analysis reveals that impermissible burden on interstate commerce exists. *Filiberto Sanitation,* 857 F.2d at 922.

Plaintiff argues, nonetheless, that NJDEP can rectify the entire matter by establishing state specific hazardous waste codes.

This argument, however, "relates to the wisdom of the statute, not to its burden on interstate commerce." *See Exxon Corp.*, 437 U.S. at 127-28 (1978). It is not the role of a court to decide whether challenged legislation is wise or whether it can be improved. Rather, the role of a court is to decide whether legislation is unconstitutional, and the regulations he are not. Simply put, "the halls of the state legislature are a more appropriate forum for resolution of these disputes than are, the walls of a judge's chambers." *American Trucking v. Larson*, 683 F.2d at 795.

III(b). RCRA Analysis

As noted earlier, plaintiff argues, in an argument which parallels its constitutional challenge, that NJDEP's regulations are inconsistent with RCRA because they undermine the uniformity of RCRA's solid waste management scheme. Thus, plaintiff explains, NJDEP's use of federal codes to describe materials the only New Jersey recognizes as solid wastes creates an inconsistency which subverts the integrity of the uniform federal hazardous waste identification system.

Before examining the merits of this claim, it is useful to scrutinize the purposes of RCRA. Congress passed RCRA in 1976 as the principal federal statute regulating the generation, transportation, and disposal of hazardous wastes. In enacting the statute, Congress believed that unless "neutralized or otherwise properly managed in their disposal, hazardous wastes present a clear danger to the health and safety of the population and to the quality of the environment." 1976 U.S. Code Cong. & Admin. News 6238, 6241. Thus, as is expressly set forth in the statute, the principal goal of RCRA was "to protect human health and the environment." *See* 42 U.S.C § 6922.

Within this broad mandate, RCRA specifies six types of requirements that the EPA should establish. *See* 42 U.S.C. § 6922(a)(1)-(6). The most distinctive and crucial of these requirements is the manifest system. A manifest is the shipping document that must be prepared by all generators of waste. It provides a means for tracking hazardous wastes by means of a paper trail from the point of generation to the point of disposal at a storage facility. More specifically, the purpose of the required manifests is "to assure that all such hazardous waste generated is designated for treatment, storage, or disposal in, and arrives at, treatment, storage, or disposal facilities . . . for which a permit has been issued as provided in this subchapter." *See* 42 U.S.C. § 6922(a)(5). The underlying premise of the manifest requirement is that if facilities are properly regulated under a permit system, and if diligent use of manifests is made by generators and transporters, hazardous wastes will end up only in proper facilities and documentation of this result will be at hand.

Although the manifest requirement is a federal requirement, RCRA acknowledges that a state may also wish to "be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State." *See* 42 U.S.C. § 6929. More importantly, RCRA explicitly declares that it does not preclude a state from adopting more stringent requirements, including manifest requirements, than those imposed by any of EPA's RCRA requirements. *Id.*[6]

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6. Other sections of RCRA show that Congress intended to grant the states a broad range of authority to deal with waste management. For instance, any state can obtain authorization from the EPA to enforce hazardous waste programs. *See* 42 U.S.C. § 6926. Further, RCRA explicitly mandates that all federal employees must comply with "Federal, *State*, interstate, and *local*

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The power that RCRA reserves to the states to adopt hazardous waste programs more stringent than the federal model is, therefore, clear and unambiguous. *See e.g. General Electric Co. v. Flacke,* 461 N.Y.S.2d 138, 140, 118 Misc.2d 729, ____ (1982). The purpose of RCRA was only to set a floor, and not a ceiling. State regulations which are only different from federal regulations, therefore, do not violate RCRA. For state regulations to violate RCRA, they must impose a less stringent standard than the federal government requires. *See e.g. Celebrezze v. Environmental Enterprises,* ____ Ohio, ____, ____, 559 N.E.2d 1335, 1341 (1990) ("A mere 'inconsistency' between the two sets of regulations does not lead to the conclusion that the state regulations must be displaced by the federal regulations.").

In order to prevail on the RCRA count, plaintiff must show that New Jersey's hazardous waste regulations are less stringent than federal regulations, clearly not the case. To suggest, as plaintiff suggests, that New Jersey's regulations are in violation of RCRA because they are inconsistent with RCRA is insufficient as a matter of law.[7]

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requirements . . . respecting control and abatement of soiid waste or hazardous waste disposal." *See* 42 U.S.C. § 6961 (emphasis added). Although these sections are not relevant here, they further establish that Congress intended to create a "nonuniform" system in which the states retain much authority to regulate hazardous waste.

7. Plaintiff claims that the New Jersey regulations *may* undercut the federal standard by vitiating its predictability thereby rendering the state's program less stringent. A non-moving party who has the burden of proof at trial "must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment." *See Anderson,* 477 U.S. at 257 (emphasis added); *See also Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1985). Mere allegations

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IV. CONCLUSION

For the foregoing reasons NJDEP's motion for summary judgment is granted An appropriate order shall issue.

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

Dated: September 4, 1991

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are not enough to defeat summary judgment. The non-moving party must "set forth specific facts . . . from which a jury might return a [favorable] verdict." *Anderson*, 477 U.S. at 256-57. Plaintiff has offered no evidence to support its argument that the New Jersey regulations lead to less stringent regulation of waste than their federal counterparts. The affidavit of Edward N. Sailer, submitted by plaintiff, and the exhibits attached thereto, point out merely that the New Jersey regulations are inconsistent with federal regulations. The dispositive issue on the RCRA count is, however, whether the New Jersey regulations produce a lower standard than federal regulations, not whether the two sets of regulations are consistent.

APPENDIX E — RELEVANT STATUTES AND REGULATIONS

40 C.F.R. § 261.2 states in pertinent part:

§ 261.2 Definition of solid waste.

(a)(1) A *solid waste* is any discarded material that is not excluded by Section 261.4(a) or that is not excluded by variances granted under Section 260.30 and 260.31.

(2) A *discarded material* is any material which is:

(i) *Abandoned*, as explained in paragraph (b) of this section; or

(ii) *Recycled*, as explained in paragraph (c) of this section; or

(iii) Considered *inherently waste-like*, as explained in paragraph (d) of this section.

(b) Materials are solid waste if they are *abandoned* by being:

(1) Disposed of, or

(2) Burned or incinerated; or

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(c) Materials are solid wastes if they are *recycled* — or accumulated, stored, or treated before recycling — as specified in paragraphs (c)(1) through (4) of this section.

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(1) *Used in a manner constituting disposal.* (i) Materials noted with a "*" in Column 1 of Table 1 are solid wastes when they are:

(A) Applied to or placed on the land in a manner that constitutes disposal; or

(B) Used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste).

(ii) However, commercial chemical products listed in Section 261.33 are not solid wastes if they are applied to the land and that is in their ordinary manner of use.

(2) *Burning for energy recovery.* (i) Materials noted with a "*" in column 2 of Table 1 are solid wastes when they are:

(A) Burned to recover energy;

(B) Used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste).

(ii) However, commercial chemical products listed in Section 261.33 are not solid wastes if they are themselves fuels.

(3) *Reclaimed. Materials* noted with a "*" in column 3 of Table 1 are solid wastes when reclaimed.

(4) *Accumulated speculatively.* Materials noted with a "*"

in column 4 of Table 1 are solid wastes when accumulated speculatively.

* * *

(d) *Inherently waste-like materials.* The following materials are solid wastes when they are recycled in any manner:

(1) Hazardous Waste Nos. F020, F021 (unless used as an ingredients to make a product at the site of generation), F022, F023, F026, and F028.

(2) The Administrator will use the following criteria to add wastes to that list:

(i)(A) The materials are ordinarily disposed of, burned, or incinerated; or

(B) The materials contain toxic constituents listed in Appendix VIII of Part 261 and these constituents are not ordinarily found in raw materials or products for which the materials substitute (or are found in raw materials or products in smaller concentration) and are not used or reused during the recycling process; and

(ii) The material may pose a substantial hazard to human health and the environment when recycled.

(e) *Materials that are not solid waste when recycled.* (1) Materials are not solid wastes when they can be shown to be recycled by being:

(i) Used or reused as ingredients in an industrial process

to make a product, provided the materials are not being reclaimed; or

(ii) Used or reused as effective substitutes for commercial products; or

(iii) Returned to the original process from which they are generated, without first being reclaimed. The material must be returned as a substitute for raw material feedstock, and the process must use raw materials as principal feedstocks.

* * *

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N.J.A.C. 7:26-1.6 *et seq.* states in pertinent part:

7:26-1.6 Definition of solid waste

(a) A solid waste is any garbage, refuse, sludge, or any other waste material except it shall not include the following:

1. Solid animal or vegetable wastes collected by swine producers, licensed by the State Department of Agriculture, who collect, prepare and feed such wastes to swine on their own farms; or

2. Recyclable materials that are excluded from regulation pursuant to N.J.A.C. 7:26-1.1(a)1; or

3. Spent sulfuric acid which is used to produce virgin sulfuric acid, provided at least 75 percent of the amount accumulated is recycled in one year.

(b) Any "other waste material" is any solid liquid, semi-solid or contained gaseous material, including, but not limited to spent material, sludge, by-product, discarded commercial chemical prducts, or scrap metal resulting from industrial, commercial, mining or agricultural operations from community activities, or any other material which has served or can no longer serve its original intended use, which:

1. Is discarded or intended to be discarded; or

2. Is accumulated, stored or physically, chemically or biologically treated prior to, or in lieu of, being discarded;

3. Is burned for energy recovery;

4. Is applied to the land or placed on the land or contained in a product that is applied to or placed on the land in a manner constituting disposal; or

5. Is recycled.

(c) A material is also a solid waste if it is "disposed of" by being discharged, deposited, injected, dumped, spilled, leaked or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into ground or surface waters.

(d) Any material recycled or reclaimed by a commercial recycling or reclamation facility pursuant to any tolling agreement or agreements defined pursuant to N.J.A.C. 7:26-1.4 shall be considered a solid waste for the purposes of this chapter.

7:26-8.1 Definition of hazardous waste

(a) A solid waste as defined in N.J.A.C. 7:26-1.6 is a hazardous waste if:

1. It is not excluded from regulations as a hazardous waste under N.J.A.C. 7:26-8.2; and

2. It meets any of the following criteria:

i. It is listed in N.J.A.C. 7:26-8.13, 8.14 or 8.15;

ii. It contains a hazardous waste constituent listed in N.J.A.C. 7:26-8.16 and is formally designated a hazardous waste through the operation of N.J.A.C. 7:26-8.6 and 8.7;

iii. It is a mixture of solid waste and one or more hazardous wastes listed in N.J.A.C. 7:26-8.13, 8.14, or 8.15; however, the following mixtures of solid and hazardous wastes listed in N.J.A.C. 7:26-8.13, 8.14 and 8.15 are not hazardous (except by application of paragraphs (a)2i or ii above, or iv or v below) if the generator can demonstrate that the mixture consists of process wastewater, the discharge of which is specified and limited in a permit issued pursuant to N.J.A.C. 7:14 et seq. or Section 402 or Section 307(b) of the Clean Water Act, 33 U.S.C. 1251 et al (and consequently N.J.S.A. 58:10A-1 et seq. or N.J.S.A. 58:11.49 et seq.), and the generator has notified the Division of Water Resources when claiming exemption pursuant to (a)2iii(1), (2), (3) or (5) below.

(1) One or more of the following spent solvents listed in N.J.A.C. 7:26-8.13: carbon tetrachloride, tetrachloroethylene, trichloroethylene, provide that the maximum total weekly usage of these solvents (other than the amounts that can be demonstrated not to be discharged to wastewater) divided by the average weekly flow of wastewater into the headworks of a facility's wastewater treatment or pre-treatment system does not exceed one part per million; or

(2) One or more of the following spent solvents listed in N.J.A.C. 7:26-8.13: methylene chloride, I,I,I-trichloroethane, chlorobenzene, o-dichlorobenzene, cresols, cresylic acid, nitrobenzene, toluene, methyl ethyl ketone, carbon disulfide, isobutanol, pyridinc, spent chlorofluorocarbon solvents, provided that the maximum total weekly usage of these solvents (other than the amounts that can be demonstrated not to be discharged to wastewater), divided by the average weekly flow of wastewater into the headworks of the facility's wastewater treatment or pre-treatment system does not exceed 25 parts per million; or

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(3) The following wastes listed in N.J.A.C. 7:26-8.14: heat exchanger bundle cleaning sludge from the petroleum refining industry (Hazardous Waste No. K050); or

(4) A discarded commercial chemical product, or chemical intermediate listed in N.J.A.C. 7:26-8.15, arising from "de minimis" losses of these materials from manufacturing operations in which these materials are used as raw materials or are produced in the manufacturing process. For purposes of this subparagraph "de minimus" losses include those from normal material handling operations including but not limited to spills from the unloading or transfer of materials from bins or other containers, leaks from valves or other devices used to transfer materials; minor leaks from process equipment, storage tanks or containers; leaks from well-maintained pump packings and seals; sample purgings; relief device discharges; discharges from safety showers and rinsing and cleaning of personal safety equipment; and rinse from empty containers or from containers that are rendered empty by that rinsing; or

(5) Wastewater resulting from laboratory operations containing toxic (T) wastes listed in N.J.A.C. 7:26-8.13, 8.14, 8.15, provided that the annualized average flow of laboratory wastewater does not exceed one percent of total wastewater flow into the headworks of the facility's wastewater treatment or pre-treatment system, or provided the wastes' combined annualized average concentration does not exceed one part per million in the headworks of the facility's wastewater treatment or pre-treatment facility. Toxic (F) wastes used in laboratories that are demonstrated not to be discharged to wastewater are not to be included in this calculation.

iv. It exhibits any of the characteristics of hazardous

waste identified in N.J.A.C. 7:26-8.9 through 8.12;

v. It is listed in 40 C.F.R. 261, Subpart D, including all future additions or supplements,

(b) A solid waste which is not excluded from regulation under N.J.A.C. 7:26-8.2 becomes a hazardous waste when any of the following events occur:

1. In the case of a waste listed in this subchapter when the waste first meets the listing description set forth in N.J.A.C. 7:26-8.13, 8.14 or 8.15; or

2. In the case of a mixture of solid waste and one or more listed hazardous wastes, when a listed hazardous waste is first added to the solid waste; or

3. In the case of any other waste (including a waste mixture), when the waste exhibits any of the characteristics identified in N.J.A.C. 7:26-8.9 to N.J.A.C. 7:26-8.12; or

4. In the case of an unlisted waste which does not exhibit any of the characteristics identified in N.J.A.C 7:26-8.9 to 8.12, when the Department makes a final determination pursuant to N.J.A.C. 7:26-8.6 that the waste is a hazardous waste; or

5. In the case of a waste listed in 40 C.F.R. 261 Subpart D, when the waste first meets the listing description set forth therein; or

6. In the case of a hazardous waste which has been subjected to recycling when the recycled material is accumulated or stored prior to burning or is burned for energy recovery, applied

to or placed on the land in a manner that constitutes disposal, or is subjected to further processing prior to becoming a product as commonly traded in commerce.

(c) Unless and until it meets the criteria of N.J.A.C. 7:26-8.1(d):

1. A hazardous waste will remain a hazardous waste.

2. Any solid waste generated from the treatment, storage or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust or leachate (but not including precipitation run-off), is a hazardous waste.

(d) Any solid waste described in (c)1 and (c)2 is not a hazardous waste if it meets the following criteria:

* * *

7:26-8.5 Hazardous waste determination: General responsibilities

(a) Any person who generates a solid waste, as defined in N.J.A.C. 7:26-1.6 shall determine whether the waste generated is a hazardous waste.

(b) If the waste generated is not a hazardous waste listed in N.J.A.C. 7:26-8.13, 8.14 or 8.15 or a mixture of solid waste and one or more hazardous wastes listed in N.J.A.C. 7:26-8.13, 8.14 or 8.15 then the generator shall:

1. Test the waste in accordance with standards set out in N.J.A.C. 7:26-8.9 through 8.12 to determine whether it exhibits any of the characteristics of hazardous waste described therein: or

2. By applying knowledge of the hazardous characteristic of the waste in light of the materials or processes used determine whether it exhibits a characteristic or characteristics described in N.J.A.C. 7:26-8.9 through 8.12.

(c) If the waste generated is not a hazardous waste by reason of the operation of N.J.A.C. 7:26-8.1(a), then the generator shall, upon request by the Department, submit, in a timely manner on a schedule approved by the Department, a plan for analyzing the waste to detect the presence of hazardous waste constituents listed in N.J.A.C. 7:26-8.16 which the generator, through knowledge of the chemical composition of the waste in light of the materials and processes used, determines may be present in detectable quantities in the waste. The generator shall conduct the approved analysis plan and submit to the Department the results of the analysis as well as such other informtion as may be necessary to verify the data provided.

(d) A generator shall keep records of any tests results, waste analysis, or other determinations made in accordance with this section for at least three years from the date that the waste was last sent to on-site or off-site treatment, storage or disposal.

(e) All determinations made by generators pursuant to this section shall be subject to review and reclassification by the Department on a finding that such determination does not meet all standards set forth herein.

7:26-8.8 Criteria for listing hazardous waste by category, class or type

(a) The Department shall after public notice and hearing list a solid waste as a hazardous waste upon determining that the

solid waste meets one of the following criteria:

1. It exhibits any of the characteristics of hazardous waste identified in N.J.A.C. 7:26-8.9 to N.J.A.C. 7:26-8.12.

2. It has been found to be fatal to humans in low doses or, in the absence of data on human toxicity, it has been shown in studies to have an oral LD 50 toxicity (rat) of less than 50 milligrams per kilogram, an inhalation LC 50 toxicity (rat) of less than two miligrams per liter, or a dermal LD 50 toxicity (rabbit) of less than 200 milligrams per kilogram or is otherwise capable of causing or significantly contributing to an increase in serious irreversible or incapacitating reversible, illness. (Waste listed pursuant to these will be designated Acute Hazardous Waste.)

3. It contains a constituent listed at N.J.A.C. 7:26-8.16 and, after consideration of the same factors as those listed at N.J.A.C. 7:26-8.6, the Department concludes that the waste is capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed. (Wastes listed pursuant to this criteria will be designated toxic wastes).

(b) A constituent shall be listed at N.J.A.C. 7:26-8.16 if it has been shown in scientific studies to have toxic, carcinogenic, mutagenic, or taratogenic effects on humans or other life forms.

(c) The Department may list classes or types of solid waste as hazardous waste if there is reason to believe that individual wastes, within the class or type of waste, typically or frequently are hazardous under the definition of hazardous waste found in N.J..A. 13:1E-1.1 et seq. and N.J.A.C. 7:26-1.4.

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(d) The Department will indicate its basis for listing the classes or types of wastes listed in this section by employing one or more of the following Hazard Codes.

Ignitable Waste	(I)
Corrosive Waste	(C)
Reactive Waste	(R)
EP Toxic Waste	(E)
Acute Hazardous Waste	(H)
Toxic Waste	(T)

(e) Each hazardous waste listed in N.J.A.C. 7:26 8.13, 8.14 or 8.15 is assigned an EPA Hazardous Waste Number which precedes the name of the waste. This number shall be used in complying with the recordkeeping and reporting requirements under N.J.A.C. 7.26-7.4(e).

7:26-8.9 Characteristic of ignitability

(a) A solid waste exhibits the characteristic of ignitability if a representative sample of the waste has any of the following properties:

1. It is a liquid, other than an aqueous solution containing less than 24 percent alcohol by volume, and has a flash point less than 140°F (60°C), as determined by a Pensky-Martens Closed Cup Tester, using the test method specified in ASTM Standard D-93-79, or a Setaflash Closed Cup Tester, using the

test method specified in ASTM standard D-3278.

2. It is not liquified and is capable, under standard temperature and pressure, of causing fire through friction, absorption of moisture or spontaneus chemical changes and, when ignited, burns so vigorously and persistently that it creates a hazard.

3. It is an ignitable compressed gas as defined in 49 CFR 173.300 and as determined by the test methods described in the regulation.

4. It is an oxidizer as defined in 49 CFR 173.151.

(b) A solid waste that exhibits the characteristic of ignitability, but is not listed as a hazardous waste in this subchapter has the EPA Hazardous Waste Number of D001.

7:26-8.10 Characteristic of corrosivity

(a) A solid waste exhibits the characteristic of corrosivity if a representative sample of the waste has either of the following properties:

1. It is aqueous and has a pH less than or equal to two or greater than or equal to 12.5, as determined by a pH meter using either the test method specified in the "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods" (also described in "Methods for Analysis of Water and Wastes" EPA 600/4 79.020, March 1979).

2. It is a liquid and corrodes steel (SAE 1020) at a rate greater than 0.25 inches (6.35 millimeters) per year at a test temperature of 130°F (55°C) as determined by the test method

specified in NACE (National Association of Corrosion Engineers) Standard RM-01.69 as standarized in "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods".

(b) A solid waste that exhibits the characteristic of corrosivity, but is not listed as a hazardous waste in this subchapter has the EPA Hazardous Waste Number of D002.

7:26-8.11 Characteristics of reactivity

(a) A solid waste exhibits the characteristic of reactivity if a representative sample of the waste has any of the following properties:

1. It is normally unstable and readily undergoes violent change without detonating;

2. It reacts violently with water;

3. It forms potentially explosive mixtures with water;

4. When mixed with water, it generates toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment;

5. It is a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment;

6. It is capable of detonation or explosive reaction if it is subjected to a strong intitiating source of if heated under confinement;

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7. It is readily capable of detonation or explosive decomposition or reaction at standard temperature and pressure;

8. It is a forbidded explosive as defined in 49 CFR 173.51, or a Class A explosive as defined in 49 CFR 173.53 or a Class B explosive as defined in 49 CFR 173.88.

(b) A solid waste that exhibits the characteristics of reactivity, but is not listed as a hazardous waste in this subchapter has the EPA Hazardous Waste Number of D003.

7:26-8.12 Characteristics of EP toxicity

(a) A solid waste exhibits the characteristic of EP toxicity if, using test methods described in Appendix II of 40 CFR 261, Subpart D or equivalent methods approved by the Department, the extract from a representative sample of the waste contains any of the contaminants listed in Table I. or Table I at 40 CFR 261.24 as amended, at a concentration equal to or greater than the respective value given in those tables. Where the waste contains less than 0.5 percent filterable solids, the waste itself, after filtering, is considered to be the extract for the purposes of this section.

(b) A solid waste that exhibits the characteristic of EP toxicity, but is not listed as a haardous waste in this subchapter, has the EPA Hazardous Waste Number specified in Table I which corresponds to the toxic contaminant causing it to be hazardous.